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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 608

GERALD MILLER AND DAVID CAUDILL, ETC.,
Appellants,

vs.

CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

G. M. FERRIS,
B. A. FARLEY,
PAUL F. SCHIFFNER,
CHARLES S. RHYNE,
Counsel for Appellees.

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OCTOBER TERM, 1949

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Appellants,

vs.

CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY; E. W. PARSONS, CHIEF OF POLICE; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN AND WALLACE N. SPROUL, CITY COMMISSIONERS, ALL PUBLIC OFFICIALS OF THE CITY OF SPOKANE, WASHINGTON,
Appellees

STATEMENT OPPOSING JURISDICTION

Come now the appellees herein and make and file the following statement opposing jurisdiction:

Statement of Facts

This action was brought by the appellants to enjoin the appellees, the City of Spokane, Washington, and certain of its officers, from prohibiting the operation, possession and maintenance of pinball machines within the city. Two questions were presented. First, are pinball machines as

described in the opinion of the Supreme Court of the State of Washington gambling devices prohibited by the laws of that state? And second, if so, is an ordinance of the City of Spokane, which would prohibit their operation, maintenance and possession, subject to referendum by the people?

On March 28, 1949, the City Council adopted Ordinance No. C10078, prohibiting the operation, possession and maintenance of pinball machines. Section 1 of that ordinance is as follows:

> "Section 1. Any person, firm or corporation who shall have in his or its possession or who shall conduct, maintain, operate or use, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character, other than slot machines in private clubs as provided by Ordinance No. C10077, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits or any other thing or representative of value, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300) or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment."

This ordinance is in conformity with Remington's Revised Statutes of the State of Washington, Section 2472, which reads as follows:

> "Possession of gambling devices. Every person who shall have in his possession or shall permit to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor."

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Prior to the effective date of Ordinance No. C10078, a petition satisfying the requirements of the referendum provisions of the Charter of the City of Spokane was filed with the City Council protesting the enactment of the ordinance. Thereafter the City Council reconsidered the ordinance as required by the Charter, and directed that it be submitted to popular vote at the next municipal election, *if such action became necessary.* At the same time, upon motion duly made, the Council ordered that

> "All persons operating or having in their possession pinball machines contrary to Remington's Revised Statute 2472 and the provisions of Section 22 of Ordinance No. C1377 of the City of Spokane be hereby notified that arrests for such violations will commence on the 23rd day of May, 1949."

Before said order was to become effective, this action was commenced to restrain enforcement of the order, and a temporary injunction was issued.

The Superior Court did not pass upon the question as to the legality of the operation of the machines, but held that, whether the machines were or were not gambling devices, the ordinance prohibiting their use was subject to referendum, and continued the injunction in force until such time as the matter could be submitted to the people for popular vote at a municipal election.

Upon appeal to the Supreme Court of the State of Washington, the judgment of the Superior Court was reversed. The Supreme Court held that the machines were gambling devices prohibited by Section 2472, Remington's Revised Statutes *supra*, which was in force and effect, and as such could not be legalized by either the city commissioners of the City of Spokane, or the people of that city acting in a legislative capacity, in view of Article XI, Section 10, of

the Constitution of the State of Washington, providing in part as follows:

> ". . . cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this Constitution shall be subject to and controlled by general laws."

The action was thereafter dismissed by direction of the Supreme Court.

Grounds Against Jurisdiction

1. The appellants have failed to comply with paragraph 2 of Rule 12 of this Court, which provides that appellants shall serve upon appellees "within 5 days after such allowance (a) a copy of the petition for the order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule." The record shows that the appeal was allowed on January 7th, 1950, and the above mentioned papers were not served upon appellees until January 18, 1950, or 6 days late.

2. There is no Federal question involved.

3. The judgment of the Supreme Court of the State of Washington did not draw in question the validity of any state statute on the ground of its being repugnant to the Constitution of the United States.

4. The real question involved is one of fact and not of law, namely, is a pinball machine as described in the opinion of the Supreme Court of the State of Washington a gambling device. The Supreme Court of Washington held that a pinball machine is a gambling device. Its decision is not reviewable in this Court.

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5. The appellants have failed to show by their "Statement as to Jurisdiction" wherein any Federal question was raised, discussed or argued in their brief, filed in the Supreme Court of the State of Washington, as required by Rule 12 of this Court.

6. The record fails to show that the Supreme Court of the State of Washington passed on any Federal question in this case.

7. This appeal is taken for delay only.

8. The questions on which the decision of this case depends are so unsubstantial as not to need further argument.

In support of the foregoing objections, we cite the following authorities:

Hiawassee River Power Co. v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 64 L. Ed. 601, 40 S. Ct. 330;

Hulbert v. *Chicago*, 202 U. S. 275, 50 L. Ed. 1026, 26 S. Ct. 617;

Whitney v. *People of State of California*, 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641;

Charleston Federal Savings & Loan Ass'n et al. v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624;

Gorman v. *Washington University*, 316 U. S. 98, 62 S. Ct. 962;

Christman v. *Miller*, 197 U. S. 313, 25 S. Ct. 468, 49 L. Ed. 770;

American Ry. Express Co. v. *Commonwealth of Kentucky*, 273 U. S. 269, 47 S. Ct. 353, 71 L. Ed. 639;

Supreme Lodge etc. v. *Meyer*, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885;

First National Bank of Garnett v. *Ayers*, 160 U. S. 660, 16 S. Ct. 412, 40 L. Ed. 573.

Any question under the Fourteenth Amendment is foreclosed by previous decisions of this Court as cited above and is so unsubstantial and frivolous as to justify the motion to affirm or dismiss filed herein.

Respectfully submitted,

G. M. FERRIS,
City Hall, Spokane, Washington,
B. A. FARLEY,
City Hall, Spokane, Washington,
PAUL F. SCHIFFNER,
City Hall, Spokane, Washington,
CHARLES S. RHYNE,
730 Jackson Place, N. W.,
Washington, D. C.,
Counsel for Appellees.

Service of the foregoing Statement Opposing Jurisdiction, by receipt of copy thereof, is hereby acknowledged this 26 day of January, 1950.

WILMOT W. GARVIN,
One of Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES

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GERALD MILLER AND DAVID CAUDILL, FOR THEMSELVES AND FOR THE BENEFIT OF OTHERS SIMILARLY SITUATED, *Appellants,*

vs.

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AFFIDAVIT

STATE OF WASHINGTON,
County of Spokane, ss.:

B. A. Farley, being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the appellees in the above entitled action; that on January 9, 1950, Wilmot W. Garvin, one of the attorneys for the appellants submitted to affiant for consideration the following stipulation:

"It is stipulated between the parties, through their respective counsel, George M. Ferris, B. A. Farley and

Paul F. Schiffner, attorneys for the City of Spokane, and W. W. Garvin, of counsel for Gerald Miller and David Caudill, that the certified transcript of the record as evidenced by the contents of respondents' Praecipe be and is hereby accepted by the City of Spokane, and it is further stipulated that the record may be sent to the Clerk of the Supreme Court of the United States forthwith.

"Dated this 9th day of January, 1950.

"....

"....

"....

"Attorneys for Appellants.

"WILMOT W. GARVIN (Signed),

"One of Attorneys for Respondents."

and in connection therewith left with affiant copies of certain proceedings which the said Wilmot W. Garvin informed affiant would be included in the certified transcript of the record; that, in addition to the proposed stipulation and copies of said proceedings, the said Wilmot W. Garvin at the same time left with affiant the following note which was typewritten save and except the last line which was in the handwriting of the said Wilmot W. Garvin, namely:

"The following items are missing which will be in your certified copy:

"Petition for Appeal
"Assignments of Error
"Order Allowing Appeal and Fixing Bond
"Bond of $1000.00
"Statement of Jurisdiction".

That counsel for the appellees were unwilling to sign said stipulation and so advised the said Wilmot W. Garvin; that on the 18th day of January, 1950, said Wilmot W. Garvin served upon G. M. Ferris, one of the attorneys for the appellees, notice and statement as to jurisdiction; that on said

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date affiant informed the said Wilmot W. Garvin that he had failed to serve the petition for appeal, assignments of error and order allowing appeal and fixing bond, and immediately thereafter the said Wilmot W. Garvin served said papers upon affiant; that at said time the attention of the said Wilmot W. Garvin was called to the note concerning the items which were missing as herein set forth and that the said Wilmot W. Garvin stated to affiant that it would be difficult to overcome said note but that he would be forced to file an affidavit to the effect that it was his recollection that he had served said papers on January 9, 1950.

B. A. FARLEY.

Subscribed and sworn to before me this 26th day of January, 1950.

NORMAN S. JOHNSON,
Notary Public for the State of
[SEAL.] *Washington, residing at Spokane.*

Commission expires Apr. 23, 1951.

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MOTION TO DISMISS APPEAL OR AFFIRM

Come now appellees herein and move this Court to dismiss with costs the appeal taken herein to this Court by appellants upon the following grounds:

1. The appellants have failed to comply with paragraph 2 of Rule 12 of this Court, which provides that appellants shall serve upon appellees "within 5 days after such allowance (a) a copy of the petition for the order allowing the appeal, together with a copy of the assignments of error and of the

statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule." The record shows that the appeal was allowed on January 7th, 1950, and the above mentioned papers were not served upon appellees until January 18, 1950, or was 6 days late.

2. There is no Federal question involved.

3. The judgment of the Supreme Court of the State of Washington did not draw in question the validity of any state statute on the ground of its being repugnant to the Constitution of the United States.

4. The real question involved is one of fact and not of law, namely, is a pinball machine as described in the opinion of the Supreme Court of the State of Washington a gambling device. The Supreme Court of Washington held that a pinball machine is a gambling device. Its decision is not reviewable in this Court.

5. The appellants have failed to show by their "Statement as to Jurisdiction" wherein any Federal question was raised, discussed or argued in their brief, filed in the Supreme Court of the State of Washington, as required by Rule 12 of this Court.

6. The record fails to show that the Supreme Court of the State of Washington passed on any Federal question in this case.

7. This appeal is taken for delay only.

8. That the questions on which the decision of this case depends are so unsubstantial as not to need further argument.

In the alternative, appellees move this Court to affirm this cause on the ground that:

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1. The appellants have failed to comply with paragraph 2 of Rule 12 of this Court, which provides that appellants shall serve upon appellees "within 5 days after such allowance (a) a copy of the petition for the order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule." The record shows that the appeal was allowed on January 7th, 1950, and the above mentioned papers were not served upon appellees until January 18, 1950, or was 6 days late.

2. There is no Federal question involved.

3. The judgment of the Supreme Court of the State of Washington did not draw in question the validity of any state statute on the ground of its being repugnant to the Constitution of the United States.

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6. The record fails to show that the Supreme Court of the State of Washington passed on any Federal question in this case.

7. This appeal is taken for delay only.

8. The questions on which the decision of this case depends are so unsubstantial as not to need further argument.

Dated this 26th day of January, 1950.

G. M. FERRIS,
City Hall, Spokane, Washington,
B. A. FARLEY,
City Hall, Spokane, Washington,
PAUL F. SCHIFFNER,
City Hall, Spokane, Washington,
CHARLES S. RHYNE,
730 Jackson Place, N. W.,
Washington, D. C.,
Counsel for Appellees.

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